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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DENNIS PAUL OWSUIK, Defendant and Appellant.	B211587 (Los Angeles County Super. Ct. No. YA071546)

APPEAL from a judgment of the Superior Court of Los Angeles County. Steven R. Van Sicklen, Judge. Affirmed and modified.

Lenore De Vita, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Linda C. Johnson and Carl N. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Dennis Paul Owsuik appeals from the judgment entered following a jury trial in which he was convicted of passing a forged prescription (Bus. & Prof. Code, § 4324, subd. (a)), second degree commercial burglary (Pen. Code, § 459),[1] and obtaining a controlled substance by fraud (Health & Saf. Code, § 11173, subd. (a)). In bifurcated proceedings, he admitted that he had a prior serious felony conviction of robbery within the meaning of the "Three Strikes" law (§§ 667, subds. (b)–(i), 1170.12) and that he had three prior felony convictions for which he had served two separate prison terms (§ 667.5, subd. (b)). The trial court denied his *Romero* motion, which requested that he be sentenced as a first-time offender (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497), and sentenced him to a total term of five years in state prison, consisting of a doubled middle term of two years, or four years, enhanced by a term of one year for the service of a separate prison term.

We modify the abstract of judgment to reflect a sentence imposed of the middle term of two years, doubled to four years on count 1. The identical terms are imposed on count 2 and count 3, imposed concurrently, and stayed pursuant to section 654. The judgment is modified to reflect 166 days of presentence custody credit and 82 days of presentence conduct credits, for a total credit of 248 days. Finally, a one-year term is imposed for the prison prior on count 1. In all other respects, the judgment is affirmed.

FACTS AND PROCEDURAL HISTORY

The trial evidence established that on April 22, 2008, appellant was treated at the emergency room of Torrance Memorial Hospital by Dr. Andrew Shen (Dr. Shen) for a head injury. After treating appellant for bruises and a head laceration, Dr. Shen wrote a prescription for appellant for 15 pills of Vicodin. On April 25, 2008, shortly after 5:00 p.m., appellant presented the prescription to a pharmacist technician at the C.V.S. store in Lomita. The pharmacist technician, Jennifer Costello (Costello), obtained appellant's name, telephone number, and date of birth. She asked him to wait while the pharmacy filled the prescription.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

Costello noticed that there was a discrepancy on the prescription between the check box for the number of pills to be dispensed and the handwritten order. She showed the prescription to the lead pharmacist technician, Virginia McNeely (McNeely), who concluded that the prescription appeared to have been altered. McNeely telephoned the hospital to verify the number of pills that were prescribed. McNeely then telephoned the police, who arrived and arrested appellant.

At trial, Dr. Shen testified that the original prescription now provided for 150 pills when he had prescribed only 15 pills. The doctor opined that no doctor would have written a prescription for an emergency room patient for so many pills of Vicodin.

In defense, appellant testified and denied that he had altered the prescription. He claimed that he did not notice that his prescription had been altered when he presented it at the pharmacy. He said that he did not alter the prescription and speculated that his girlfriend, who was mad at him, must have made the alteration.

Appellant's credibility was impeached with 2002 and 2004 prior felony convictions.

The jury returned guilty verdicts.

At sentencing, the trial court imposed a doubled two-year middle term for count 1, passing a forged prescription, enhanced by one year for the service of one prior prison term, a total term of five years. Pursuant to section 654, the trial court ordered stayed the consecutive terms of imprisonment it imposed for counts 2 and 3. Both the prosecutor and trial counsel protested that the trial court had imposed unauthorized terms of punishment for counts 2 and 3. Appellant's counsel insisted that the trial court could sentence appellant concurrently, "on all three together, just lumped into one sentence and not separate them out under [section] 654." After listening to the prosecutor's and trial counsel's remarks, the trial court imposed the following sentence.

"Amending what I said a moment ago, [appellant is] being sentenced on counts 1, 2 and 3; and for the reasons I already stated with respect to count 1, I am selecting the midterm sentence because of the prior strike. That's times by two, which reaches four years and then with one prison prior, striking the other one, it's five years on all three

counts. There's no duplicate punishment because they are all lumped together in one sentence."

The trial court found that appellant had served 165 days in custody preceding sentencing. It asked whether presentence conduct credit was calculated in the same fashion as during the imposition of a county jail sentence. Trial counsel replied that pursuant to the Three Strikes law, appellant would have to serve 80 percent of his prison term. The trial court asked whether it was required to make that calculation in its sentencing order and asked trial counsel whether the appropriate conduct credit award was 15 percent of 165 actual days, in other words, 24 days of conduct credit. Trial counsel replied, "Yes." The trial court awarded appellant 24 days of conduct credit.

The abstract of judgment provides that the trial court imposed a doubled, middle term of two years, or four years for count 1, a two-year middle term for count 2, and a two-year middle term for count 3. It reflects that the trial court ordered stayed the terms imposed for counts 2 and 3 pursuant to section 654. The abstract of judgment states that the trial court found true that appellant had suffered three section 667.5, subdivision (b), enhancements, and that it had ordered stayed two of the three 1-year enhancements. The total term in state prison was five years. Appellant was awarded presentence credits in the amount of 189 days, consisting of 165 days of actual credit and 24 days of local conduct credit pursuant to section 2933.1.

We appointed counsel to represent appellant on this appeal.

After examination of the record, counsel filed an "Opening Brief" in which no issues were raised.

On February 2, 2009, we advised appellant that he had 30 days within which to personally submit any contentions or issues which he wished us to consider. No response has been received to date. This court has reviewed the sealed reporter's transcript of the August 8, 2008, *Marsden* proceedings. (*People v. Marsden* (1970) 2 Cal.3d 118.)

On April 9, 2009, we requested supplemental briefing from the parties on the following issues: (1) whether the trial court imposed an unauthorized sentence when it "lumped" together the terms for counts 1, 2, and 3, and failed to order separate terms

imposed for counts 2 and 3, which could then be ordered stayed pursuant to section 654; (2) whether pursuant to the decision in *People v. Thomas* (1999) 21 Cal.4th 1122, 1126-1127, 1130, and section 4019, appellant is entitled to a recalculation of his presentence conduct credit pursuant to *People v. Smith* (1989) 211 Cal.App.3d 523, 527; and, (3) whether a reversal and a remand for resentencing is required to correct the above error.

DISCUSSION

1. The abstract of judgment shall be modified to reflect the oral judgment.

Appellant and the People agree the trial court was required to impose sentence on count 1 as the principal term, order separate terms for counts 2 and 3, and stay those terms under section 654.

Appellant points out that initially the trial court imposed identical terms for counts 2 and 3, but later lumped together the terms for counts 1, 2, and 3. Appellant urges that "it is clear from the totality of the record on the sentencing hearing the trial court intended to sentence appellant on count 1 to five years, and to stay the terms imposed for counts 2 and 3." Appellant urges that reversal and remand for resentencing is not required to clarify the trial court's pronouncement of sentence, which was ministerial or technical error.

The People suggest that we reverse and remand for resentencing because the trial court could have selected count 1 as the principal term, and counts 2 and 3 as subordinate consecutive terms pursuant to section 1170.1, subdivision (a).[2]

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[2] Section 1170.1, subdivision (a) provides: "Except as otherwise provided by law, and subject to Section 654, when any person is convicted of two or more felonies . . . and a consecutive term of imprisonment is imposed under Sections 669 and 1170, the aggregate term of imprisonment for all these convictions shall be the sum of the principal term, the subordinate term, and any additional term imposed for applicable enhancements for prior convictions, prior prison terms, and Section 12022.1. The principal term shall consist of the greatest term of imprisonment imposed by the court for any of the crimes, including any term imposed for applicable specific enhancements. The subordinate term for each consecutive offense shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction for which a consecutive term of

We conclude that the better course is to correct the abstract of judgment so that it reflects the intention and iteration of the trial court. Where there is a discrepancy between the oral pronouncement of judgment and the minute order or the abstract of judgment, the oral pronouncement controls. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185-186.) "Courts may correct clerical errors at any time, and appellate courts . . . that have properly assumed jurisdiction of cases have ordered correction of abstracts of judgment that did not accurately reflect the oral judgments of sentencing courts." (*Id.* at p. 185.)

The trial court intended at the outset to select the midterm of two years, doubled to four years as to count 1, adding one year for the separate prison term. It then stated that it was "going to impose *identical sentences on counts 2 and 3*" (italics added), then *stay them pursuant to section 654*. Following the arguments of counsel, during which appellant's counsel insisted that the sentences be imposed concurrently, the trial court still indicated that it was sentencing appellant on counts 1, 2, and 3. Even though the trial court noted that the sentence was "all lumped together," it stated it intended "*no duplicate punishment*." (Italics added.) The abstract of judgment, however, indicates terms of two years each, stayed for counts 2 and 3 and does not indicate whether the terms were to be served concurrently or consecutively. We conclude by the trial court's statements that it intended to impose *identical sentences concurrently* and stay them.

Accordingly, we shall order the abstract of judgment modified to reflect a sentence imposed of the middle term of two years, doubled to four years on count 1. The identical terms are imposed on count 2 and count 3, imposed concurrently, and stayed pursuant to section 654. Finally, a one-year term is imposed for the prison prior on count 1.

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imprisonment is imposed, and shall include one-third of the term imposed for any specific enhancements applicable to those subordinate offenses."

2. The judgment shall be modified to reflect the proper presentence custody and conduct credit.

Appellant and the People agree that appellant is entitled to actual custody credits of 166 days (rather than 165 days) and to presentence conduct credits of 82 days (rather than 24 days) for a total of 248 days of presentence credits (rather than 189 days).

Appellant received 189 total presentence credits for 165 actual custody days and 24 conduct days. However, appellant was arrested on April 25, 2008, and was in presentence custody until he was sentenced on October 7, 2008. Therefore, he was entitled to presentence actual custody credit for 166 days.

Appellant and the People agree that appellant is entitled to presentence conduct credits of 82 days rather than 24 days. The parties urge that the trial court improperly calculated his conduct credits of 24 days based on the lesser maximum 15 percent formula set forth in section 2933.1.[3] (§ 4019; *People v. Buckhalter* (2001) 26 Cal.4th 20, 30-32; *People v. Thomas, supra,* 21 Cal.4th at pp. 1126-1127, 1130 [by its terms, § 1170.12, subd. (a)(5), does not address presentence conduct credits for those defendants sentenced under the Three Strikes law, and to fall within the purview of § 2933.1, the current conviction must be a violent felony].) Where, as here, a defendant's current conviction is for an offense not "violent" within the meaning of section 667.5, subdivision (c), the trial court should award presentence custody credits under section 4019, rather than section 2933.1. (*People v. Thomas, supra*, 21 Cal.4th 1124, 1127-1130.)

"""Penal Code section 4019, specifies how prisoners may obtain certain credits. Subdivisions (b) and (c) of that section provide: 'for each *six-day period* in which a prisoner is confined in or committed to a specified facility' one day shall be deducted from his period of confinement for performing labors, and one day shall be deducted for

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[3] Section 2933.1, subdivision (a) provides: "Notwithstanding any other law, any person who is convicted of a felony offense listed in subdivision (c) of Section 667.5 shall accrue no more than 15 percent of worktime credit, as defined in Section 2933."

compliance with the rules and regulations of the facility. Subdivision (f) of that section provides 'if all days are earned under this section, a term of six days will be deemed to have been served for every *four days spent in actual custody*.' (Italics added.)" [Citation.] [¶] Credits are given in increments of four days. No credit is awarded for anything less. . . . Under the statutory scheme, "rounding up" is not permitted.'" (*In re Marquez* (2003) 30 Cal.4th 14, 25-26, citing *People v. Smith, supra,* 211 Cal.App.3d at p. 527.)

Accordingly, based on appellant's 166 actual custody days, he was entitled to 41 sets of four days. Pursuant to section 4019, he was entitled to 41 presentence conduct credit days "for labor" and an additional 41 presentence conduct credit days for compliance with "rules and regulations." (*People v. Smith, supra,* 211 Cal.App.3d at p. 527.) Thus, he is entitled to 166 days of presentence custody credit and 82 days of presentence conduct credits, for a total credit of 248 days.

Appellant urges that this court correct the credit. The People request that the matter be remanded for recalculation. But, computational errors of presentence credits that result in an unauthorized sentence are subject to correction by the trial court or the appellate court when presented. (*People v. Serrato* (1973) 9 Cal.3d 753, 763, overruled on other grounds in *People v. Fosselman* (1983) 33 Cal.3d 572, 583, fn. 1; *People v. Guillen* (1994) 25 Cal.App.4th 756, 764.)

We shall modify the judgment to reflect 166 days of presentence custody credit and 82 days of presentence conduct credits, for a total credit of 248 days.

DISPOSITION

The abstract of judgment is modified to reflect a sentence imposed of the middle term of two years, doubled to four years on count 1. The abstract of judgment is modified to reflect that the identical terms are imposed on count 2 and count 3, imposed concurrently, and stayed pursuant to section 654. A one-year term is imposed for the section 667.5, subdivision (b) enhancement on count 1. The judgment is modified to reflect 166 days of presentence custody credit and 82 days of presentence conduct credits, for a total credit of 248 days. A certified copy of the corrected abstract of judgment shall be sent to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, P. J.

BOREN

We concur:

_____, J.

DOI TODD

_____, J.

ASHMANN-GERST